No. 2531

United States
Circuit Court of Appeals

For the Ninth Circuit

Appelant's Brief

FRANK L. TOBEY and RETTA M. TOBEY, His Wife, AUGUSTA M. TOBEY and WILLIAM L. TOBEY,

Appellants,

vs.

EDWARD C. KILBOURNE et al.,

Appellees.

Appeal from the United States District Court for the District of Oregon

---

A. C. WOODCOCK,
E. R. BRYSON,
R. S. SMITH,
JOHN M. WILLIAMS,
LOUIS E. BEAN,
Attorneys for Appellants.

No. 2531

United States
Circuit Court of Appeals
For the Ninth Circuit

Appelant's Brief

FRANK L. TOBEY and RETTA M. TOBEY, His Wife, AUGUSTA M. TOBEY and WILLIAM L. TOBEY,

Appellants,

vs.

EDWARD C. KILBOURNE et al.,

Appellees.

STATEMENT OF THE CASE

HISTORY OF THE WAHLUKE PROJECT

The Wahluke project, so-called, lies in Grant County, Washington, along the Columbia River, and consists of an irrigation scheme to irrigate the lands lying within the project. The project as originally

contemplated consisted of a pumping plant and irrigation ditches for the purpose of irrigating some seven or eight thousand acres of land. This land was some eighty feet above the Columbia River, and lay in a bench surrounded by higher land above it, and this bench it was contemplated to irrigate practically the whole thereof by two systems of ditches. The first one, as aforesaid, embracing six or eight thousand acres of land, and the upper ditches embracing practically all the remaining part of the bench. No attempt has ever been made to construct more than the first irrigation ditch. A company was organized in 1907 by H. H. Humphreys and George W. Armstrong, for the purpose of irrigating this land. The authorized capital stock was one hundred thousand dollars. After frittering away this stock, another corporation was organized with a capital stock of five hundred thousand dollars, small tract of land purchased and a townsite laid out, called Wahluke. After frittering away most of the stock of this corporation, the project was taken over by W. E. DeLarm and A. J. Bichl, they getting possession of the stock of the second corporation. In January, 1910, a contract was entered into with Kilbourne & Clark Company, of Seattle, Washington, for the construction of the pumping plant, and work was begun by them upon this plant and continued until July, 1910; at that time practically nothing having been paid to the construction company, they suspended work.

At this time the Kilbourne & Clark Company claimed that the Columbia River Orchard Company, represented by DeLarm and Biehl, owed them some forty-three thousand dollars. To relieve the situation, DeLarm and Biehl issued bonds of this company to the amount of sixty-two thousand dollars, and fifty-nine thousand dollars were traded off for property of various kinds. This situation continued down to the latter part of 1910, and early in 1911 when DeLarm and Biehl conceived the idea of issuing an unlimited quantity of bonds.

The land within the project was owned partly by private individuals, and partly by the Northern Pacific Railroad Company, and partly by the Government of the United States. Some persons had settled upon the Government land, and had filed desert land entries thereon. In the scheme of irrigating this land it was proposed that these desert land owners should enter into a mortgage with the Columbia River Orchard Company, whereby they were to pay one hundred dollars an acre for water placed upon the desert land claims, and a mortgage was given to secure the same upon the desert land entries. The scheme entered into by DeLarm and Biehl, was to place these desert land mortgages with a Trust Company, and the Trust Company to handle the bonds. For the first fifty-nine thousand dollars of 8 per cent bonds put out in 1910, a Seattle Company was trustee, and held a few of these desert land mortgages

to secure the payment of the bonds. This Seattle corporation was consolidated with a banking corporation in Seattle, and a new trust officer appointed for the trust department, and finding this trust agreement with the Columbia River Orchard Company, together with the desert land mortgages among the effects of the old Trust Company, the trust officer investigated the matter and immediately filed a resignation as such trust officer with the Columbia River Orchard Company. DeLarm and Biehl then organized the Oregon and Washington Trust Company, of Portland, to take over this trust agreement and to handle the bonds. This trust company had a capital stock of fifty thousand dollars, and was taken by A. J. Biehl, W. E. DeLarm, G. C. Hodges, H. H. Humphrey, and E. J. Brazell, and the trust company organized.

And at the same time, or about the same time, a new corporation was organized known as the Washington Orchard Irrigation and Fruit Company, to take over the Wahluke Project, DeLarm and Biehl being the principal manipulators of the whole concern. The bonds were to run to the Oregon and Washington Trust Company, and to be guaranteed by the Washington Orchard Irrigation and Fruit Company, and signed by the Columbia River Orchard Company.

Equipped with this outfit of corporations and trust agreements and the bonds, DeLarm and Biehl commenced to issue large quantities of bonds either late

in 1910 or early in 1911, and trading bonds for property and up to the first of March as near as can be ascertained, they had outstanding some three or four hundred thousand dollars of these bonds so guaranteed by the Washington Orchard Irrigation and Fruit Company and backed by the security of some of these water mortgages.

Some time prior to this DeLarm and Biehl, or some of their corporations, had entered into a contract with the State of Washington for the purchase of the East Half of Section 16, Township 14 North, Range 26 East, Willamette Meridian, within the Wahluke Project, and also had entered into a contract with a real estate firm of the name of Maltby & Pearl and other parties for the purchase of Section 20, same township and range, and they had conceived the scheme of subdividing these tracts into five and ten acre tracts and selling the same to various parties for $350.00 an acre, with the promise of putting water upon the same. They had made either one or two payments on the half of Section 16 and a small payment on Section 20, amounting to approximately five or six thousand dollars. The purchase price of Section 20 was one hundred dollars an acre, sixty-four thousand dollars for the section. They conceived the idea of placing these contracts also with the Trust Company as a guarantee behind the bonds to the extent of 125 per cent of the bonds issued.

HISTORY OF TOBEY CONTRACT

The plaintiffs herein were the owners of a wheat ranch in Gilliam County, Oregon, consisting of 4,350 acres, together with a full equipment of farm tools, implements, machinery, horses, mules, etc., for operating the same.

Wishing to dispose of the same, they listed it with a real estate broker in Portland, Oregon, for sale at $25.00 per acre (p. 92 Record Test. W. L. Tobey). A few days afterward a real estate agent called them up and proposed a deal for Columbia River Orchard Co. bonds. After some talk with the various people who represented the Orchard Co., they entered into an agreement to trade the ranch and its equipment for $120,000 in Columbia River Orchard Co. bonds.

W. E. DeLarm, who was the leading spirit in the Columbia River Orchard Co., and its kindred associations, arranged with W. L. Tobey to visit the ranch with a friend who was an expert in agricultural lands. At the time appointed, DeLarm, with Edward C. Kilbourne, one of the respondents, appeared and in company with W. L. Tobey visited and inspected the ranch. W. L. Tobey, after this visit to the ranch, went to Seattle, in an attempt to investigate the bonds. At Seattle, he talked with various parties suggested to him by DeLarm, among them was A. C. Gunn and from Mr. Gunn he got the idea that if the securities behind the bonds had to be sold to pay the bonds, they would pay out about eighty

per cent. On his return to Portland, he turned down the contract already entered into, as it contained a provision that the Tobeys were to be satisfied with the bonds.

Further negotiations were had, and finally on March 4, 1911, a new contract was entered into (Exhibit A to the Bill, Page 24, Record) whereby the Tobeys were to get Columbia River Orchard Co. bonds to the face value of $140,000.00 for the ranch and its equipment. The full consideration was $141,000.00. Of this sum $1,000.00 was to be in cash to pay for supplies at the ranch then on hand. (Test. W. L. Tobey, p. 101 Record).

On March 4, 1911, the parties met in Portland and the deeds to the land were made out, and at that time, at the request of DeLarm, the deeds were made to run to Edward C. Kilbourne, respondent herein.

Edward C. Kilbourne and Charles A. Kilbourne, the respondents, were principal stockholders in the Kilbourne-Clarke Co., the contracting engineers of the pumping plant at Wahluke.

The deeds were placed in escrow until the 24th of March, 1911, and were then delivered to the parties. Within a day or two after the delivery of the deeds to Edward C. Kilbourne, he executed a deed to the property to respondent Charles A. Kilbourne, and both the Kilbournes now claim to own the property.

ISSUES IN THE CASE

In the negotiations between the Tobeys and DeLarm, it was represented to the Tobeys that the bonds were secured by mortgages held by the Trust Co., to the value of 125 per cent of the bonds issued, and that in addition to this the bonds were secured by land contracts upon which there was due 125 per cent of the bonds issued.

It was also represented to the Tobeys that the Company owned some 4,000 acres of land within the project, and had options on about 10,000 acres of railroad lands within the project. (W. L. Tobey, pp. 93-95, 116-117, F. L. Tobey, Record, pp. 336-338).

These representations, it is claimed in the bill, were false, that DeLarm knew them to be false and that they were falsely and fraudulently made for the purpose of cheating and defrauding the Tobeys out of their land; that they relied upon these representations being true and that on account thereof they believed that the bonds were well secured and that the Washington Orchard Irrigation and Fruit Company were amply able to back up its guaranty on the bonds. That relying upon these representations and believing them to be true they made the deeds described in the bill and were thereby cheated and defrauded out of their lands and equipment. They also claim that Edward C. Kilbourne and Charles A. Kilbourne were parties to this fraud and had knowledge thereof.

The Kilbournes claim in their answer that there was no fraud, and if there was they had no knowledge or notice thereof, and that they paid a valuable consideration therefor, and were therefore innocent purchasers for value without notice.

The Court, in the memorandum on the merits, found there was fraud in the transactions as alleged, but held that the Kilbournes were innocent purchasers for value without notice.

ERRORS ON APPEAL

The errors contended for on appeal are:

I

The Court did not find that fraud was committed as alleged in the Bill, and as set out in the foregoing statement.

II

The Court did not find that Edward C. Kilbourne and Charles A. Kilbourne were connected with the fraud and had guilty knowledge thereof.

III

The Court erred in finding that Edward C. Kilbourne and Charles A. Kilbourne were innocent purchasers for value without notice at the time the deeds

to the land were executed and turned over to Edward C. Kilbourne.

IV

The Court erred in finding that Edward C. Kilbourne and Charles A. Kilbourne had no knowledge of the fraud at the time they paid DeLarm the $10,000.00 in September, 1911.

V

The Court erred in not granting the complainants the relief prayed for in the Bill of Complaint.

VI

The Court erred in dismissing plaintiffs' Bill of Complaint and in giving judgment against them for costs and disbursements of suit.

POINTS ON LAW

I

The false representations made in this case were such as the plaintiffs were under the circumstances entitled to rely upon.

Crane vs. Elder, 29 Pac. 151.

Proger vs. Old Nat'l Bank, 56 Pac. 391.

"In selling stock in a corporation representations that the company is not in debt and is making prof-

its of a certain specified amount which are untrue are fraudulent. Redding vs. Wright, 49 Minn. 322. In such a case the person to whom made is not required to obtain information from other sources, even if readily accessible. Faribault vs. Sater, 13 Minn. 223; Kiefer vs. Rogers, 19 Minn. 32; Burr vs. Willson, 22 Minn. 206; Porter vs. Fletcher, 25 Minn. 493; Olson vs. Orton, 28 Minn. 36; Maxfield vs. Schwartz, 45 Minn. 150; and he is under no obligation to investigate and verify statements, to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith. Mead vs. Bunn, 32 N. Y. 275, at p. 280."

Cited in Smith on Laws of Fraud, Sec. 6 C. P. 76.

II

"It is not necessary that the defendants' false representations should have been the sole cause, or even the principal inducement for the plaintiff to enter into the contract. If it exerted a material influence upon his mind, although it was only one of several motives acting together which produced the result, the defendant would be liable."

Smith on Laws of Frauds, Sec. 51 (i) p. 83.

Sioux Nat'l Bank vs. Norfolk, 56 Fed. 139.

III

One who purchases merely an equity cannot be a bona fide purchaser. The doctrine of bona fide purchaser is not applicable to the purchase of an equity.

2 Warvell on Venders (2nd Ed.) 708.

York vs. McNutt, 16 Tex. 13; 73 Am. Sec. 607.

Butler vs. Douglas, 3 Fed. 613-14.

Latham vs. Barney, 14 Fed. 446.

Wallterton vs. Snow, 15 Fed. 404.

Vattier vs. Hinds, 8 L. Ed. 682.

Boone vs. Chiles, 9 L. Ed. 399-400; 35 U. S.; 10 Pet. 211.

Smith vs. Orton, 18 L. Ed. 64.

Bonelli vs. Burton, 61 Ore. 429.

This rule was recognized by the lower Court in the memorandum on merits, p. 74, but held that the Kilbournes did not purchase the equitable but the legal title.

IV

Where under or by virtue of the assignment of a contract or option procured by fraud or by direction of the defrauding party, the deed is made direct to a third person, such third person will not stand in any other or better situation than the defrauding

party, and cannot be regarded as an innocent purchaser.

Torey vs. Buck et al, 2 N. J. Equity 366.

Seibel vs. Higham (Mo.), 115 S. W. 987 : 129 A. St. Rep. 510-11.

Bonelli vs. Burton, 61 Ore. 429.

In Torey vs. Buck the deed was made direct by the defrauded party to an innocent third person at the instance of the defrauding party, the innocent third party paying full consideration therefor to the defrauding party, and taking the title in good faith and without notice of fraud.

We have not the case before us to quote from, but the Court held unequivocally that since the deed was made direct and in consequence of the fraud perpetrated by Buck, the defrauding party, Hamilton would not stand in any other or better situation than would Buck had the deed been made to him, and that his relation to the transaction was such that he could not occupy the position of an innocent purchaser, although the Court found he took the title in good faith, for value without notice.

In Seibel vs. Higham, the facts briefly were that Higham and Myer had by fraud acquired title to the lands in controversy. They gave an option to Graham to purchase for $2,200.00, for which option Graham paid $200.00 down. Graham had knowledge sufficient to taint his option. Graham procured Bar-

nard to purchase under his option, Barnard paying value and being innocent of any knowledge. We quote that portion of the decision material upon this question:

"3. Is the defendant corporation that now holds the title an innocent purchaser? Whatever right it has to that distinction is derived from Mr. Barnard; the deeds from Barnard to Mrs. Scoble and from her to the defendant corporation were without consideration, and were designed only to pass to the corporation the title which Barnard acquired from Meyer.

"After Higham had acquired possession of the escrow and had obtained from Douglas and Thompson the quitclaim deed to Meyer and had put both instruments on record, he and Meyer undertook to find a purchaser for the property and at last negotiated an option to Graham for $2,200.00, for which option Graham paid $200.00 down—that is, he paid that much of the proposed purchase money, to be forfeited if he should fail to pay the balance. He let the period of his option pass without exercising it, then he asked for an extension, which after some negotiations was finally agreed to, and the right to purchase at that price was extended ten days. During that extended period he induced Barnard to buy the property at the option price. In his testimony, referring to Mr. Graham, Mr. Barnard said: 'He

(Graham) paid $200.00 on this option, and I paid him that back; I was not continuing the option, I was buying the property.' And Mr. Graham testified: 'I claim that Mr. Barnard purchased that altogether independent with my rights in the premises and he simply repaid me or made me good for what I paid on account.' These quotations from their testimony are made to show that they both tried to convey the idea that Barnard's purchase was independent of Graham's option, but that is only their opinion of the legal effect of the transaction; the facts do not justify the opinion. The facts are that after Graham obtained the extension, and within the extension, he approached Barnard and solicited him to advance the money to purchase on the terms of the option, and within that extension Barnard closed the transaction by paying Meyer $2,000.00 and Graham $200.00 he had paid on the option. Barnard testified that when Graham spoke to him about buying the property he told him he had an option on it, and showed him the paper; it was signed by Meyer; Graham testified, 'When this option was finally closed out, the title to the property was taken in the name of Barnard.' Graham had the right, under his option, to buy the property by paying $2,000.00 in addition to the $200.00 he had already paid, and at the closing of the transaction he was there prepared, with the help of Barnard, to exercise that right of purchase at that price, and he did exercise

it, directing the deed to be executed to Barnard instead of himself. Whether Barnard could at that time have bought the property for that price, if Graham had not had the option, we do not know; we only know that with the option he did obtain the property by paying $200.00 to Graham and $2,000.00 to Meyer, and that he availed himself of the Graham option in the transaction to get the property at that price. That put him in Graham's shoes. When Graham bought his option he knew that Meyer held the title in trust for himself, Higham, Seibel and the Boepple heirs or devisees, as their respective interests might appear, and he also knew that Seibel and Mrs. Boepple were not consenting to the sale to him. If Graham had first concluded his purchase and had placed his deed on record and had afterward negotiated an independent sale to Barnard, who had bought knowing nothing except what the record showed, we would have had a different case. Under the circumstances of this case we hold that Barnard was not an innocent purchaser. In fact, instead of being an innocent purchaser, he and Graham are rather in the attitude of conspiring with Meyer and Higham to wrong Seibel and the Boepple heirs."

In Bonelli vs. Burton, our own Court has gone even a step further and held that where the rights of the alleged bona fide purchaser were initiated by taking assignment of a contract procured by fraud, he would

take charge with notice of the fraud, although afterwards in consequence of his payment of the purchase price to the original vendor the deed deposited in escrow under the terms of the agreement were delivered and a deed obtained from the grantee, the defrauding party, to the alleged bona fide purchaser. To understand the full effect of this case it must be borne in mind that Burton was in all respects, except in the manner in which he acquired his title, a bona fide purchaser for value and without notice. In this case the Court says:

"This contract created only an equity, the transfer of which did not make Burton an innocent purchaser, or give him any right to the premises superior to that possessed by the assignor. Kerr, Frauds, 321. In Boone vs. Chiles, 10 Pet. 177, 209 (9 L. Ed. 388) Mr. Justice Baldwin, discussing this subject, says: 'A purchaser with notice may protect himself under a purchaser by deed without notice, but cannot do it by purchase from one who holds claim by contract only. The cases are wholly distinct. In the former the purchaser with notice is protected; in the latter, he has no standing in equity, for an obvious reason—that the plaintiff's elder equity shall prevail unless the defendant can shelter himself under the legal title acquired by one whose conscience was not effected with fraud or notice, and who can impart his immunity to a guilty purchaser, as the representative of his legal rights, fairly acquired by

deed, in such a manner as exempts him from the jurisdiction of a court of equity. Such a purchaser affixes no stain upon the conscience, and equity cannot disturb the legal title. But, as it does not pass by a contract of purchase without deed the defendant can acquire only an equity, the transfer of which does not absolve him from the consequences of his first fraudulent purchase."

The lower Court, in the memorandum on the merits, held that this case did not apply in the following language:

"In Bonelli vs. Burton, (61 Or. 429), the defense of innocent purchaser for value was not made or considered."

But the language above used by the Supreme Court of Oregon laid down the law applicable by way of argument and in effect held that had the defense of innocent purchaser for value been pleaded and raised in the case, it would not have availed the defendant, for the reason that his purchase was that of an equity and therefore he took with notice.

V

Where fraud is proved and the defendant relies upon a defense that he is a bona fide purchaser, he must allege and prove that he was a bona fide purchaser, for a valuable consideration paid without notice of a fraud, or of such facts as would put a rea-

sonably prudent man upon inquiry and the burden is on him to prove it.

6 Ency. of Ed. 14-16.

2 Pomeroy's Eq. Jur. Sec. 785.

Salisbury vs. Barton, 66 Pac. 619.

Boone vs. Chiles, 9 L. Ed. 399-409. 10 Pet. 211.

Weber vs. Rothchild, 15 Or. 389-91.

Hyland vs. Hyland, 19 Or. 55.

Simpkins vs. Windsor, 21 Or. 386.

Starr vs. Stevenson, 60 N. W. 219, Par. 5.

Whitcker Iron Co. vs. Pres. Nat'l Bank, 59 N. W. 396, Par. 2.

Neff vs. Landis, 1 Atl. R. 177, Pa.

In Weber vs. Rothchild, 15 Or., at page 390, the Court says:

And this brings us to the examination of a very important question in this case, and that is this: Is the plaintiff required to prove a negative, by showing that the defendant did not pay a valuable consideration, or, having shown the fraudulent intent and purpose of the grantor, may he stop and require the grantee to prove that he paid value, in order to protect his title? Here the defendant Rothchild has alleged facts in one part of his answer tending to show that he is a *bona fide* purchaser for value without notice of this property, but he has offered no evidence

whatever on those issues. The plea of a *bona fide* purchaser for value as here alleged is an affirmative defense interposed by the defendant, and in this connection it is not perceived that it differed from other affirmative defenses. The party having the affirmative of the issue must offer evidence to support it."

VI

Notice of facts sufficient to put a reasonably prudent man on inquiry is sufficient.

60 N. W. 220, Par. 6, Starr vs. Stevenson.

Tiedemann on Sales, Sec. 329.

13 Ency. of Ed. 909.

"It has generally been held that where one purchases or obtains possession of property from a fraudulent vendee, the burden is upon him to show that he is a bona fide purchaser in good faith for a valuable consideration and without notice. This is the rule that has been adopted in this state. Dry Goods Co. vs. Kahn, 53 Kan. 276; 36 Pac. 327; Wafer vs. Bank, 46 Kan. 611; 26 Pac. 1032. Mr. Tiedeman, in speaking on this subject, says: 'Section 329. That the purchaser must take the goods in good faith and without notice of the defect in the vendor's title. But not only must he be without knowledge of the defect, but he must not even know facts which are calculated to arouse the suspicion of a reasonably prudent man that everything was not right. . . .

The burden of proof is upon the party who claims the protection of a bona fide purchaser.' "

Cited from Salisbury vs. Barton, 66 Pac. 619.

Conn. Mut. Life Ins. Co. vs. Smith. (Mo.)

38 Am. St. Rep. 666.

Balfour vs. Parkinson, 84 Fed. 860, 1.

"Notice of the fact was of such a nature as ought to have put an ordinarily prudent man on inquiry, and in such case a failure to make inquiry is visited with all of the consequences of actual notice. (Mier vs. Blume, 80 Mo. 179.)"

Cited in Wood vs. Rayburn, 18 Or. 18.

Hyland vs. Hyland, 19 Or. 57.

VII

The burden is upon such a defendant to prove payment in full before notice.

Johnson vs. Georgia Trust Co., 141 Fed. 593.

Balfour vs. Parkinson, 84 Fed. 859, 60.

Boones vs. Chiles, 9 L. Ed. 400.

Smith vs. Orton, 18 L. Ed. 64.

Wood vs. Rayburn, 18 Or. 20.

Hyland vs. Hyland, 19 Or. 55.

VIII

One who takes as security of, or in payment of a

pre-existing indebtedness, does not take for a good consideration.

35 Cyc. 353.

2 Pomeroy's Eq. Jur. Secs. 748-9.

Western Grocer Co. vs. Alleman (Kans.)

106 Pac. 460, 135 Am. St. Rep. 398.

Temple vs. Osburn, 55 Or. 510.

IX

To be a bona fide purchaser, one must come into equity with absolutely clean hands.

Schneider vs. Sellers, (Tex.), 81 S. W. 129.

2 Pomeroy's Eq. Jur. 762.

X

Contradictory or misleading statements and inadequacy of consideration are badges of fraud which suggest bad faith or knowledge.

Biglow on Fraudulent Conveyances (Rev. Ed.), Chapter XVII.

His statement to the receiver that he had never loaned Davis money on any former occasion is proved to have been untrue by his own admission under oath. A false statement is always suggestive of fraud. He knew that Davis was being pressed by his creditors, and was urgent to secure money by pledging goods, which he knew were not paid for. The large quantity of goods, the place of their depos-

it, the defacing of all marks from the original packages, the pretense of Davis that he had engaged a large storeroom, which he had failed to secure, the transfer of nearly $40,000 worth of goods on such terms as precluded their redemption, and the failure to make any inquiry, are a few of the circumstances, calculated to create a strong doubt of the integrity of the transaction between Davis and Peabody. "They threw on Peabody the duty of making a full explanation, and the burden of proof to sustain it." Clements vs. Moore, 6 Wall, 299, 315; Piddock vs. Brown, 3 P. Wms. 289; Wharton vs. May, 5 Vs. 49; Zook vs. Simmonson, 72 Ind. 83. He has wholly failed to produce any evidence to relieve the transaction of the strong doubts of its integrity which surround it. The title of his pledgor was fraudulent and violable, and, if Peabody is to be permitted to defeat the prior rights of the parties defrauded by Davis, it can only be done when on the whole evidence it is made to appear that he was a bona fide purchaser for value. If, on the whole case, strong doubts of the integrity of the transaction exist, the prior rights of Davis' creditors will prevail.

Cited in Morrow Shoe Co. vs. N. E. Shoe Co., 57 Fed. 697.

24 L. R. A. 424.

Clement vs. Moore, 6 Wall, 299-18, L. Ed. 786.

6 Ency. of Ed. 143.

13 Ency. of Ed. 906.

"The price alleged to have been paid was so entirely inadequate as to have put a prudent man on inquiry."

Cited in 15 Or., Weber vs. Rothchild, p. 389.

"Good faith cannot be predicated upon want of knowledge resulting from the evasion of a plain duty. A man cannot shut his eyes to the light of day, and say he is without knowledge that the sun is shining."

Cited in Bowman vs. Metzger, 27 Or. 31.

"The situation must not be judged from the mere statement of witnesses. Very few cases can be found in the books where the fraudulent designs of parties have been defeated that could not have been decided the other way if the court had depended alone upon the statements of interested parties. Fraud seldom works in daylight. Its ways are hidden and secret. It is usually masked when it appears in the sunlight. It travels incognito. Its outward form is usually honest and virtuous. It is always plausible, and many times deceptive. Because this is so, it is the duty of courts to use the judicial searchlight with great care and prudence. The identity of this legal bogy is frequently revealed by its environment. Facts and circumstances small and inconsiderable in themselves often lead to unerring conclusions."

Cited in Zimmerman vs. Bannon, 77 N. W. P. 736 (Wis.).

XI

The failure of defendants to testify to lack of notice or knowledge prior to the performance of their contract to complete the pumping plant, and prior to their release from their contract to install the second unit, warrants a presumption of notice.

13 Ency. of Ed. 905.

Farley vs. Bateman, 22 S. E. 72.

"Another rule of law, equally elementary, which is frequently applied in such cases, is that when a fact is peculiarly within the knowledge of a party, he must furnish the necessary evidence of such fact."

Cited in Rothchild vs. Weber, 15 Oregon, p. 391.

XII

The Iowa reports cited in the memorandum on the merits to sustain the Court's position are not at hand, but we have them in the N. W. Reporter and cite them from these reports.

"The distinguishing feature between the cases cited under paragraph 111 of this brief and those cited by the court is: That in all the cases cited by the court there was an intervening equity before the passing of the legal title, just as in the case at bar, while in the cases cited by defendant there was no such intervening equity."

41 N. W. 210 (2 L. R. A. 529), McCleary vs.

Wakefield, was not a case of fraud, but of failure of consideration.

110 N. W. 930 (119 Am. St. 639), Hall vs Eary, the question of fraud was decided against the plaintiff seeking to set aside the deed and the defendant had no knowledge of the original transaction whatever. 124 N. W. 607, Augustine vs. Schmitz. In this case it was claimed that a deed was made to the party committing the fraud and afterwards changed.

115 Pac. 1081, Clemmons vs. McGeer, was decided on the pleadings. The fraud was sought to be set up in the reply in a suit to quiet title and was held to be a departure and the reply failed to connect the defendant in any way with the fraud.

The real question involved in all these cases was the validity of a deed delivered with the grantee's name left blank and afterwards filled out. None of the defendants in these csaes were in any sense a party to the original deal.

POINTS ON MATTER OF FACT

I

The false representations were clearly proved to have been made beyond doubt. These representations were:

A. The bonds were secured by 125 per cent of good, valid and solvent securities.

B. That the bonds were further secured by 125 per cent of sales contracts.

C. That the company had sufficient assets to back up the guarantee on the bonds of the Washington Orchard Irrigation and Fruit Company, (See clause in bond itself as set forth, page 14, Bill of Complaint, and the following portions of the testimony:

Testimony of William L. Tobey, Record, pages 92 to 96 and 99 to 100, and 115 to 116.

F. L. Tobey, Record, pp. 336 to 338.

Statements of same character made to others.

Testimony of M. Isabelle Forbes, p. 298, Record.

Testimony of F. C. Koppen, p. 270, Record.

Exhibit 25, p. 565, Trust Agreement.

Exhibit 23, p. 563, letter to F. C. Koppen.

Exhibit 71, p. 600, letter to Belle Nickell.

Exhibit 77, p. 603, letter to Leonard Agency.

Exhibit 83, p. 607, letter to Mrs. F. D. Cooney.

Exhibit 87, p. 610, letter to W. A. Burleigh.

Exhibit 89, p. 610, letter to C. H. Graves.

Exhibit 93, p. 613, letter to S. C. Douglas.

Exhibit 149, p. 649, letter to Leet.

II

That they were false is just as clearly proven:

A. The securities held by the Trust Company were water mortgages on Desert Land Claims.

B. These water mortgages did not amount to the required sum.

The total amount of these water mortgages held altogether during the time that the Trust Company was doing business amounted to $372,000. (Exhibit 37, p. 571). The amount of these securities on March 6th, 1911, was $92,000. See Exhibit 38, page 572, letter from George C. Hodges, the trust officer, to DeLarm and Biehl, giving a list of the securities, being James Perry, $8,000; Mary Domay, $20,000; Jennie Koppen, Elizabeth Montgomery, W. E. Stickles, W. B. Weber, $16,000.; and of this the Mary Domay mortgage was accompanied by a $16,000 note not signed, and the mortgage had been changed to include 160 acres not put in the mortgage originally, and without any authority. (Testimony of F. C. Koppen, p. 221.)

The original list of mortgages transferred to the Trust Company at Portland were the following, and were dated March 16, 1911; Laura Wattle and husband, F. C. Koppen and wife, Emil F. Cordes, Virgil H. Robinson and Alfred Gagner and wife, amount $16,000 each, or $80,000.

The Tobey deeds were made on the 15th day of March, 1911, before this assignment was made. (Exhibit B to the Bill of Complaint, page 29.) At the time the Tobeys were negotiating for these bonds, late in February and early in March, they were told that there was $300,000 or $325,000 of bonds then is-

sued. (Test. W. L. Tobey, page 105-106, F. L. Tobey, page 342.)

That the DeLarm people were minimizing the amount outstanding is clearly shown by the various statements made by them. Exhibit 63, a statement under oath, dated March 11, 1911, before these bonds were delivered, shows an outstanding liability of bonds in the sum of $400,000. (Page 593.) In Exhibit 62, page 591, it is stated that there was $104,000 in bonds issued, and in Exhibit 59 DeLarm says there were upwards of $500,000 worth of bonds issued under date of February, 1911. These parties never kept any list of the bonds they issued, testimony of Miss Day, page 262, so it was impossible to ascertain with any degree of certainty the amount of bonds outstanding at the time of the Tobey deal. As the sworn statement made to the Casualty Company was for the purpose of obtaining credit, a statement made therein might be taken as approximately correct, which is that there was $400,000 of the bonds outstanding, which was on March 11, 1911. From the testimony herein it is probable that the officers of the Company never knew how many bonds they had out.

The total sales contracts that they had outstanding at the final close was $239,465.00 worth. These contracts were on lands in Sections 16 and 20, within the Wahluke Project, and upon which they had nothing but a contract for the purchase thereof. (Test. of F. C. Koppen, page 218 and 219), and of

these they kept no record in the main office. (Test. Isabelle Forbes, page 298.)

To fill up the discrepancies in these securities on March 15th, 1911, the Washington Orchard Irrigation and Fruit Company made and delivered to the Oregon and Washington Trust Company, a mortgage for $1,000,000.00, covering the pumping plant, franchises, machinery, and so forth. This mortgage was afterwards declared void by the U. S. District Court at Seattle. (Exhibit 57, page 581), and it will be shown hereafter that at the time the land, upon which the pumping plant was situated and the right of way for the ditches, was the property of the Northern Pacific Railway Company, and that no agreement had been made with them for the purchase thereof, except the tentative agreement which hadn't been carried into effect, and was never carried into effect so far as the Washington Orchard Irrigation and Fruit Company was concerned. To show the carrying out of their fraudulent operations, Exhibit 36 was introduced in evidence, dated September 30th, 1911, being a mortgage covering a note for $7,500,000 given by Washington Orchard Irrigation and Fruit Company to Columbia River Orchard Company, and endorsed over to Oregon and Washington Trust Company, covering practically the same property as in Exhibit 35. (Exhibit 36, page 569.)

C. Some of these mortgages were about to expire, and some of them had already expired. Exhibits 32,

33, and 34, page 568, expired in May, 1911; Exhibit 9, page 552, expired April 1, 1911; Exhibit 10, page 552, expired May 16, 1911.

It needs no argument to show that these mortgages were practically worthless. They were mostly taken on Desert Land filings, and the title thereto was in the Government of the United States, and the validity thereof depended upon the title being transferred from the Government to the individual, and that depended on putting water on the land and the value thereof thereafter depended upon the cultivation of the land, making the whole thing a speculative and promotion scheme pure and simple. The contracts were all based on Sections 16 and 20, to which the DeLarm people had no title other than a mere equitable interest under their contracts, and the value of the lands depended entirely upon future contingencies.

The method of trading the bonds for property as detailed by DeLarm, page 586, in Exhibit 58, which shows the general scheme of disposing of the bonds, was a proposition calculated to dispose of the bonds at much less than their par value, and the immense number of these bonds that were put out showed the intention from the first of the DeLarm people to defraud everybody they could. Testimony of Louis B. Sichler, page 285, at the bottom of the page, shows that there was a total, during the year 1911, of some four and a half million par value of the bonds

put out, and the testimony of M. Isabelle Forbes, page 297, 809, shows the recklessness of the DeLarm people in disposing of the bonds and that they themselves treated them as worthless, and disposed of them to get whatever they could out of them to defraud the public.

The DeLarm people never had any real substantial backing, as shown by Exhibit 58, page 282, being a resume of the whole scheme by DeLarm himself, showing his efforts to put out bonds in the name of one corporation, taking the property in the name of another to get it out from under the bonds, and to save even what little they had put into the Wahluke project.

The whole thing was a gigantic scheme to defraud.

The evidence shows that they did not hesitate to use forgery in obtaining these securities.

They forged Jennie Koppen's name to a note and changed her duplicate mortgage to cover her homestead. Testimony Jennie C. Koppen, pp. 331-2.

They changed the 40 acre mortgage of Mary A. Domay, to a 200 acre mortgage. F. C. Koppen, Testimony, pp. 220-1.

The affidavit of W. E. DeLarm to these mortgages, declaring them to be valid and solvent securities (Exhibit 25, p. 565) was in itself a fraud. (Form of affidavit, Ex. 12, p. 555.)

The statement of resources, 4,000 acres owned and 10,000 acres under option, was a bald fiction. W. L.

Tobey, p. 94. See also M. Isabelle Forbes, p. 298.

Testimony of F. C. Koppen, as to what they actually owned. P. 218-219.

Testimony of G. H. Plummer, p. 163, as to Northern Pacific lands.

Charles A. Kilbourne testified, p. 532, "I found out subsequently the whole affair was crooked."

The lower court found that the fraud was proven. Memorandum on Merits, p. 72.

III

That the Tobeys relied upon the false statements made to them, transferred their property in reliance thereon, and were thereby cheated and defrauded of their property, is clearly shown.

Testimony of W.L. Tobey, pp. 101 and 102, and 115 to 126.

Testimony of W. L. Tobey, pp. 340 and 343-4.

W. L. Tobey attempted to make an investigation of the bonds at Seattle, but was steered up against A. C. Gunn, who was connected with the company, (Testimony of Isabelle Forbes, p. 306), and Morrison, who was one they usually referred prospective traders to. Exhibit 149, p. 649. Inquiries made from other than these two were unavailing. Testimony of W. L. Tobey, pp. 99 and 100.

IV

The purchase by the Kilbournes was the equity in the land which DeLarm held under his contract. Exhibit A to the Bill, pp. 24-27. As DeLarm never received the legal title, the only title he ever had was this equity.

E. C. Kilbourne testified, p. 380: "The result was that he agreed to have it deeded to me as security, etc.," and on page 386, "As I said before, on the 8th of March when we agreed to accept the ranch in payment and go ahead and complete the plant, we didn't agree upon any terms for which we would allow for the ranch, but on the 24th of March we came to an agreement with Mr. DeLarm regarding what we would do. It wasn't reduced to writing." (Then follows statement of agreement.)

The lower court found, p. 71, Memorandum on Merits:

"Before the deed had been executed and delivered to DeLarm, he sold the property to the defendants Kilbourne, in consideration that, as individuals, they would assume and pay an indebtedness of about $43.-000 due the Kilbourne & Clark Company on an unfinished contract for the construction of a pumping plant for the Orchards Company and would complete such contract and install an additional unit." As DeLarm had nothing to sell but his equity, he could sell nothing but the equity and the Kilbournes could buy nothing but the equity from him.

The lower Court, however, found, p. 74, Merits:

"But the Kilbournes did not purchase DeLarm's interest in the contract with the plaintiffs, or succeed to his rights thereunder, nor in their defense based on such contract. They purchased the legal estate and it has been conveyed to them, and the fact that the deeds were made to them direct by the plaintiffs, and not to DeLarm and by him to them, does not, in my judgment, deprive them of the right of a bona fide purchaser."

The legal title to this property was bought and paid for with bonds, and the Kilbournes did not purchase the legal title with bonds unless they were parties with DeLarm in the whole deal.

No consideration whatever passed between the Tobeys and the Kilbournes for the deeds. In the answer, p. 62, Record, the Kilbournes say: that at the time DeLarm held the equitable title and this equitable title furnished the consideration. DeLarm surrendered this equitable title, not to the Tobeys, but to the Kilbournes, and it was this equity the Kilbournes traded for, and this was done before they obtained the legal title from the Tobeys. It follows, then, that no consideration passed to the Tobeys from the Kilbournes for the legal title.

V

The Kilbournes were not innocent purchasers, for value without notice.

The Kilbournes were stockholders in the Kilbourne Clark Co., and officers and agents of the company. Testimony E. C. Kilbourne, p. 365; C. A. Kilbourne, p. 487.

At the time they entered into the contract to build the pumping plant, they inquired as to resources and found them to be as follows: Testimony of E. C. Kilbourne, p. 367. "At that meeting Mr. DeLarm went over verbally his resources, which he had at that time consisted of desert land water mortgages, chiefly; a tract of land, 40 acres, known as the townsite of Wahluke; and 320 acre piece of school land, which they had under contract to purchase from the state."

They then entered into the contract, Exhibit F, p. 663, on Jan. 18, 1910, and proceeded with the work of construction of the pumping plant until the bills, including engineers' profits, amounted to $45,355.72. Exhibit 135, p. 638. During all this time they received no pay on the work; but had taken a lot of these water mortgages as security and DeLarm had caused to be deeded and transferred to E. C. Kilbourne some lots and mortgages, some of the lots were sold and some mortgages paid which were credited on the account. These deeds and mortgages were as follows:

Hawkins mortgage, $1,334, and Sam Archer mortgage, $825; testimony of E. C. Kilbourne, pp. 414-415, both credited July 15, Exhibit 135, at p. 641.

Reinmouth property and Billings property, valued

at $15,000.00, p. 411, E. C. Kilbourne, 406, Ex. 138, p. 642.

Green Lake Add. lot, p. 418, Exhibit 136, netting $874.42.

Anderson mortgage, $800.00. Exhibit K, Test. p. 420.

Burke's Second Addition lot, pp. 425 and 430, E. C. Kilbourne, $1,000, kept by Kilbournes.

Palisades Addition lot, Exhibit 144, page 645, E. C. Kilbourne, p. 425, turned back.

The whole stock and trade of DeLarm and Biehl was the Columbia River Orchard bonds. (Ex. 59, p. 582, at pp. 585 and 586. Exhibits 69, p. 599; 79, p. 605; 85, p. 608; 86, p. 608; 90, pp. 610-12; 92, p. 612; 95, p. 613; 96, p. 614; 98, p. 615; 100, p. 615; 101, p. 616; 104, p. 616; 105, p. 617; 106, p. 618; 107, p. 620; 114, p. 626; 118, p. 628; 119, p. 628; 120, p. 629; 122, p. 630; 125, p. 633; 126, p. 634.) The evidence of that fact is voluminous.

The Kilbournes knew that these bonds were being traded wherever possible for property. They knew that bonds were traded for the Tobey property, and they recommended Glover to take his 840 acres for bonds. Exhibit 145, p. 645, and also Nott Ex. 142, p. 644. There is nothing in their evidence to show that they didn't know that the bonds were being traded wherever trades were possible. On the contrary, C. A. Kilbourne testified, pp. 532-3:

Q. Didn't you know then, Mr. Kilbourne, up to

the time that the thing collapsed, that is, during the pendency of it, the latter part of it, that they were unable to negotiate their bonds for money, either there in Seattle, or anywhere else?

A. No, I didn't know they were not able to. I knew they hadn't sold any so far for cash; that is, that I knew of. They may have sold some, but I mean to say, it hadn't been reported to me, and they still owed us money.

Q. Anyhow, you knew this thing: In order to get money, they would have to do it through the bonds —what they told you before?

A. Yes, sir.

Q. You depended on that. You depended on their statement about that, knowing from their statement that was the only method they had, as far as you knew, of getting money?

A. I expected them to realize from the sale of their bonds, and pay us.

Q. Did you know of any other way they had to get money?

A. No, I didn't know of any other way.

Q. You relied upon their sale of bonds to get money to pay you?

A. I certainly figured that is the way they would get it.

Q. Now, up to the time the Tobey deal was made, you knew then that they couldn't get money through the bonds? That is, they hadn't got money?

A. I will have to say I didn't know that. I understood they had made some sales or trades in some way, so they had disposed of some of their bonds, how many I don't know. I have never been told.

E. C. Kilbourne testified, p. 437:

"I wondered how he could get $140,000 then because I had known of some of this—of his having bought properties for bonds, he told us about."

From July 15, 1910, down to the Tobey deal in March, 1911, the Kilbournes had received but very little on their claim. In cash they had received $800.00 from the Anderson mortgage, and $874.42 from the Green Lake Addition lot. They had as security the Tacoma properties—Billings and Reinmouth—valued at $15,000.00, and the Burke's Addition lot, valued at $1,000.00, and a lot of their water mortgages.

In this state of the account the Tobey deal was made, as detailed by W. L. Tobey, pp. 92 to 106, and by F. L. Tobey, pp. 336 to 341, and between DeLarm and the Kilbournes as detailed by E. C. Kilbourne, pp. 379 to 388 and 400-1, and by C. A. Kilbourne, 493 to 496. The land was taken over for a consideration of about $69,000.00, according to statement of the Kilbournes, but we will show by analysis of the figures hereafter, that it was much less that that sum.

The Kilbournes testified that they thought there was but $300,000.00 of bonds to be issued, and that

the project was good for that amount of bonds. E. C. Kilbourne, pp. 404 and 437-8.

It must have been upon this testimony that the lower Court found the Kilbournes to be innocent purchasers. E. C. Kilbourne, pp. 436-7.

Q. Now, at this time, May 27th,, or the end of May, at the time you wrote this letter, did you believe those bonds good?

A. Yes.

Q. Why did you think they were good?

A. Because we had practically completed the pumping plant then, Fox was about through with the ditch, well along with it, and it looked as though things were going to be all right.

Q. You thought water would be in the ditch?

A. Yes, sir; we had then the machinery all in.

COURT: Did you know how many bonds had been issued?

A. I supposed $300,000.00.

COURT: That is what you thought when you wrote this letter?

A. Yes, sir.

In the introduction of the Glover letter of May 27, 1911, Exhibit 145, p. 645, the Court made the following remark, at page 427:

"COURT: That is written two months after the trade; after he admits he knew that bonds had been traded. Put that in the record if you want to. The

only thing the Court can draw from that is that at the time he thought the bonds were good."

The question arises at this point: Was the Court warranted in the conclusion that the Kilbournes thought that the bond issue was limited to $300,000.00, and that the project was good for that amount of bonds?

We call the Court's attention to the following facts which we think warrant a different conclusion:

1. At the time of the Tobey deal E. C. Kilbourne, at page 437, knew that bonds had been traded to such an extent that he wondered how DeLarm got the $140,000.00 to trade to the Tobeys. Then he claims, and this is one of their main contentions, that the Tobey ranch was worth not more than $52,000.00, p. 49, and the personal property not more than $9,500.00, p. 50. Answer making, making a total valuation of $61,500.00 placed upon it in their answer. Edward C. Kilbourne had been over the ranch and examined it.

According to Mr. Kilbourne's story then, he thought that DeLarm was extravagant with the bonds, and the Kilbournes knew that if the bonds were ever paid, they would have to be paid out of the project. They must have thought that DeLarm, if the bonds were GOOD, was getting only 50 per cent of the value of his bonds in the deal, and that he was burdening the project with bonds to the extent of 100 per cent greater than their proceeds.

Then again, when he wrote the letter to Glover, Exhibit 145, p. 645, he must have known that DeLarm had bonds to trade, although he "wondered" at the amount of the Tobey bonds. When he enclosed the Nott letter, Exhibit 142, p. 644, in the letter to Hodges, Exhibit 140, p. 643, he must have known that DeLarm still had bonds to trade.

This copy of the Nott letter bears internal evidence that it is the copy enclosed in the letter, Exhibit 140, p. 643; C. A. Kilbourne's testimony, pp. 511-512, and Mr. C. A. Kilbourne practically admits the letter, although he refused to acknowledge that it was the copy.

In the Glover letter, Exhibit 145, E. C. Kilbourne says in addition to advising Glover to trade his land for bonds, p. 646 : "They have made some extensive purchases of lands in Oregon, and I understand they just completed a deal for several thousand acres of timber land." This letter is dated May 27, 1911, and yet on or about March 15, 1911, E. C. Kilbourne wondered where DeLarm got all the bonds necessary to trade for the Tobey ranch.

In the letter of May 23, 1911, E. C. Kilbourne, in his letter to C. M. Glover, Exhibit N, p. 673, used this language: "We are not in shape to buy the land at present, but the parties from whom we bought the Tobey ranch are anxious to get another farm on similar terms, therefore, if you will write giving me

a complete description and inventory, as near as possible, we will put it up to the party."

The Glover land was traded for bonds (E. C. Kilbourne, p. 446), and traded to the Kilbournes for a lot of stuff wanted by DeLarm, and the attention of the Court is called to the language used by E. C. Kilbourne in testifying about this, as follows: Mr. DeLarm came in about a month after this, a month or two (referring to Glover letter), and said—asked—says—"I would like to sell you 840 acres of land." I says, "We are not buying land." He says, "Well, it joins your ranch." I said, "Where?" He said, "It is the Glover land." I said, "You got that?" He said, "Yes." I said, "How did you get that, and when?" And he explained that they bought it with their bonds, and then wanted to sell it to us.

From these circumstances, we think the conclusion naturally follows, that the Kilbournes knew that the bond issue was an unlimited one, notwithstanding their oral testimony in court that they thought the issue was limited to $300,000.00. If they knew it at the time of these letters, when did they learn it? It was up to them to explain, and they failed to do so. Their testimony that they thought the bond issue limited apparently covered the whole of the time from the first issue down to the final crash in February, 1912, and undoubtedly this is the impression they desired to give the Court in their oral testimony, and the Court found that they still thought the bonds

good down to the time the $10,000.00 was paid to DeLarm out of the Wakefield mortgage in September, 1911. On page 72, in the Memorandum on the Merits, the Court says: "But the evidence shows that the defendants Kilbourne were not parties to such fraud, and knew nothing about it until long after they had paid the full consideration agreed by them to be paid for the property." Again, on page 73, the Court says: "paid DeLarm ten thousand dollars, which was a reasonable sum, to be released from the stipulation to construct the additional unit, before they had any notice or knowledge of the fraud."

We think that the conclusion of the Court was erroneous, page 427, that the Glover letter, Exhibit 145, p. 647, was evidence to him that E. C. Kilbourne thought the bonds were good; and we think that from the foregoing facts and other facts hereafter to be discussed, that the Glover letter is evidence that the Kilbournes were standing in with DeLarm, assisting him to trade his bonds for property, and that they were actively engaged in reaping the chief benefit therefrom.

Again, the Kilbournes knew that the irrigation projects were all at this time in a bad way financially, and that that kind of securities were a drug on the market. The Kilbourne Clark Co. went out of business December 31, 1910. Ex. K, p. 429.) and C. A. Kilbourne testified at page 492:

Q. Why did the Kilbourne & Clark Company go out of business?

A. Well, for the last two or three years they had been engaged principally in constructing irrigation and pumping plants, not the ditch plant, merely the machinery part of it, and the market for irrigation securities was apparently so bad, had become so bad, that most of the companies for whom we were doing work were in financial straits. They couldn't sell their securities, and they couldn't pay us, and we could no longer continue in business, and I was not able to put up any more money, and didn't feel inclined to do so anyhow, so when this Columbia River Orchard job got in bad shape, we decided the best thing to do was to go out of business entirely, and merely to finish up the work we had on hand.

2. At the time the Kilbourne Clark Co. took the contract for the pumping plant, DeLarm gave the Kilbournes a statement of the resources behind the project, which consisted of 40 acres of land, some desert land water mortgages, and a contract for 320 acres of school land. (E. C. Kilbourne, p. 367.)

During the summer of 1910, and while the pumping plant was being built, E. C. Kilbourne interested himself in trying to get the Northern Pacific Railway Co. to sell the right of way for the ditches and the lot upon which the pumping plant was being built, to the Columbia River Orchard Co. (Testimony of G. H. Plummer, pp. 164-5-7; E. C. Kilbourne,

pp. 394-5-6-7-8), and the Kilbournes knew that the right of way for the ditches and the site for the pump house was still in the Railway Co., at the time of the Tobey deal. In fact, the title to these lands never passed to either the Columbia River Orchard Co., or to the Washington Orchard Irrigation and Fruit Co., but was deeded to the Columbia River Water Co., a corporation that had nothing to do with the bonds.

On February 7, 1911, Mr. Wells, of the Pacific Power & Light Co., in response to a telephone inquiry from C. A. Kilbourne, wrote a letter to Mr. Kilbourne (Ex. 146, p. 646), calling his attention to the definite facts, it would be necessary to furnish the Power Co., in order to obtain the contract for power from that company. In response to this, DeLarm sent to Kilbourne Clark Co., the statement, Ex. 147, p. 647, on February 10, 1911. This statement was a long ways from being the definite information required by Mr. Wells in the letter of February 7. Mr. E. C. Kilbourne, when asked about these letters, turned them off thus:

Q. You remember receiving such a letter?

A. No, I don't, but I presume I did. That is a matter that I don't retain in my mind, because it wasn't part of my business. I retain those things that I have to do and do, better than mere statements of things like that. What I observe or have done, accomplished, why, I remember pretty accurately. Those things that I haven't to do with, like

that, I don't." The inability of DeLarm to show definite resources evidently was no concern of Mr. Kilbourne.

At the time of the Tobey deal DeLarm had failed utterly to comply with Mr Wells' request, and never did comply with it, and this fact was undoubtedly known to the Kilbournes at all times. They knew, too, that DeLarm included in that Exhibit 147 all the lands covered by the second ditch and that DeLarm had not even commenced to take any steps looking to its construction.

We desire to show, from the foregoing fact, that the Kilbournes had knowledge of the resources of the DeLarm people; that they had knowledge that DeLarm, through them, was called upon for definite information and couldn't and didn't furnish it. Then Mr. E. C. Kilbourne, at page 454, says: "They offered 200 acres of land, I think it was down in Jefferson County, which they had purchased from Mr. Morrison with their bonds," etc., and on page 455: "We furnished abstracts to Kerr & McCord, who were the attorneys of the Pacific Power & Light Company in Seattle, on some land down in Jefferson or Clallam County." And again, "I don't think they were satisfied with the value of the land at that time."

Q. You said they were ready to go ahead?

A. Oh, they have been at all times.

Q. Under what condition?

A. That enough security be put up to guarantee their bill for a year or two.

The Kilbournes then knew during all this time that DeLarm was unable to furnish the security asked for, at the time of the Tobey deal. See testimony H. P. Nolan, p. 483.

3. The method of dealing with the DeLarm people by the Kilbournes furnishes an insight into their motives in all these transactions.

The Kilbournes entered into the contract of January, 1910, Exhibit F, pp. 663-4, upon the basis of cost for all work, tools and material, with a profit of ten per cent added.

They then let a sub-contract to Puget Sound Bridge & Dredging Co., on the same basis, with a twelve and one-half per cent profit added to the Dredging Co., Exhibit H, pp. 666-7. The profit of ten per cent to the Kilbourne Clark Co. was added to this. Then when payments hadn't been made they get an amendment to the contract and make the per cent of the profit twenty-five per cent. Exhibit G, pp. 664-5-6, and at the same time raise the limit of cost and provide in Paragraph 3 a stringent provision for forfeiture on account of failure to make payments.

The twelve and one-half per cent profit on the Puget Sound Bridge & Dredging Co. account made the price to the Kilbournes 112½ per cent of cost, and adding their 25 per cent to this makes 140.625 per

cent of the cost of that part done by the Dredging Co., and of this the Kilbournes get 28.125 per cent as their profit.

The deal for the Tobey land by the Kilbournes with DeLarm will be noticed later on, and shows a continuance of the policy of the Kilbournes to get everything possible for themselves and to enhance their profits.

The deal for the Glover lands, heretofore set out also shows a continuance of the same, and others will be noticed further on.

4. The deal between DeLarm and the Kilbournes for the Tobey ranch.

The Kilbournes had two theories in their testimony of the purchase price of the Tobey ranch. One was that C. A. Kilbourne had furnished to the Kilbourne Clark Co., about $73,000.00, and that he cancelled this indebtedness in consideration of the ranch being deeded direct. (C. A. Kilbourne, pp. 492 and 495; E. C. Kilbourne, p. 389), and the other was that they assumed the indebtedness of DeLarm's corporation to the Kilbourne Clark Co.

Then they had two theories as to the manner in which the title first went to E. C. Kilbourne. One was that it was deeded as security for DeLarm's debt, and the other was that it was deeded outright in payment. E. C. Kilbourne, pp. 379, 380, 386; C. A. Kilbourne, pp. 494-5.

There is also a discrepancy between E. C. Kil-

bourne and C. A. Kilbourne, as to who purchased the ranch.

On page 408, E. C. Kilbourne states: "That was E. C. Kilbourne and C. A. Kilbourne, the agreement on the 24th of March, and we agreed to pay off the Kilbourne & Clark claim of $43,000.00."

On page 494, C. A. Kilbourne says: "And at that time we made a definite arrangement that the Kilbourne & Clark Company should take over the land in payment of this account, providing DeLarm would do certain other things which he agreed to do." Then he follows with the full statement of the agreement, and then adds: "For the advances which I had made personally, I would take the land for my claim, and would credit the Kilbourne & Clark Co. on the account whatever they had put into it, whatever it had cost them plus their profits, so the Kilbourne & Clark Company would receive the entire benefit to that point." On page 496 he adds: "I will say this also; that it was agreed in my finally taking over the land, that Kilbourne was to have a certain interest in it, in proportion to the amount of money which he himself had coming." Then his counsel tried to straighten this out to square with E. C. Kilbourne's testimony, but failed to make it so.

Which one of the two defendants is correct we do not undertake to say, but in either event it is pertinent to inquire what E. C. Kilbourne paid for his interest in this land, and we shall undertake to show

that so far as the case discloses, it isn't shown that he paid anything.

The deal as detailed by both of these parties, that the consideration going to the DeLarm people, as the account owed to the Kilbourne & Clark Company, less a little over $10,000.00 agreed to be paid by DeLarm, $7,500.00 to the Puget Sound Bridge & Dredging Co., and the Moran account, which according to Exhibit 135, pp. 638-9-640, amounted to $2,571.99; the completion of the pumping plant at a cost of $17,000.00, and the construction of a second unit estimated at $10,000.00. The account then due, less payments received by sales of property and payment of mortgages, transferred by DeLarm to E. C. Kilbourne, was $41,522.30, reducing this sum by the value of the lot in Burke's Second Addition (pp. 540 and 431), leaves a balance of $40,522.30. Reducing it further by the amount DeLarm agreed to pay and for which he put up as security the Tacoma properties, valued at $15,000.00, amounting to $10,071.99, leaves $30,450.31 as the amount of this claim to be applied on the purchase price of the Tobey ranch. Of this amount the Kilbournes figured in $9,071.14 profit on the contract under their 25 per cent clause. Of the sums then owed the Kilbourne & Clark Company, in arriving at what was paid DeLarm, only $30,450.71 could possibly be figured into the purchase price of the Tobey lands.

Then of the sum they claim as the cost of finishing

the pumping plant, they have inserted $1,000.00 interest and attorney's fees they paid the Puget Sound Bridge and Dredging Co. (See item under date of July 27, Ex. T, at page 681.) This item doesn't belong in this account.

They have also added $1,603.88 for profit at ten per cent on cost, although E. C. Kilbourne testified, p. 430, that no profit was included. This item then should be reduced by this $2,603.88.

In this connection it is pertinent to notice the apparent frankness of the Kilbournes in producing their books for our inspection, pp. 500-1-2. When, however, more definite information was sought than that contained in Exhibit T, p. 677, as to the various items of expense contained therein, it was found that the original books of entry, the journal, etc., were missing, and that the ledger gave no further information, p. 537. When it was noticed that sums of $1,250.00, $1,000.00, $1,069.80 are shown only as deposits in the bank and $500.00 expenses, etc., the significance of this inquiry is apparent and the frankness of these parties in offering their books for inspection is only apparent and not real.

Again an item of salary and expense of Managing Engineer, $1,000.00, appears at p. 683, in the $17,000 account which appears to have been paid May 22, 1912.

However, reducing the item of $17,642.77 as it appears in the statement by the $1,000.00 attorney fee

and $1,603.88 profits, and we have the sum of $15,-038.89, as the cost as near as we can get at it from the statement.

In this connection it is pertinent to notice, Exhibit 137, p. 642, which is a letter from E. C. Kilbourne to DeLarm, estimating the cost of completing the plant at $5,500.00. This letter was written Nov. 8, 1910.

A comparison of E. C. Kilbourne's oral testimony, pp. 427-8, with the items in Exhibit T, p. 677, shows rather wild statements on the part of Mr. Kilbourne, as to the cost of some items in the cost of completion of the plant.

Adding the $30,450.31, balance of Kilbourne & Clark account $15,038.80 shown as cost of completing plant as far as they went with it and the $10,000.00 paid to DeLarm to release them from the second unit and we have $55,489.20 as the cost of the Tobey ranch. Of this sum the part they are to pay to the Puget Sound Bridge and Dredging Co. has not been paid, and the Dredging Co. have foreclosed the lien on the pumping plant. If this company should sell the pumping plant for enough to pay their lien, the Kilbournes may never have it to pay, and in that event would never have to pay the $7,500.00 for which they hold the Tacoma properties as security.

Not much wonder they desired to show the property was worth no more than $52,000.00, and the personal property no more than $9,500.00.

5. *Value of Property.* The witness J. L. Blalock.

p. 314; R. T. Cox, p. 318; L. O. Ralston, p. 322; J. A. Ward, p. 324; E. O. Tobey, p. 326; Jay Bowerman, p. 361; Walter S. Wade, p. 468; are all on the question of valuation.

Walter S. Wade, p. 469, places the value of the land at $15.00 in cash per acre. This witness was called by defendants.

J. L. Blalock, p. 315, places the value of the land at from $20.00 to $25.00 per acre; L. O. Ralston, p. 322, at $20.00 to $25.00 per acre; J. A. Ward, p. 324, wouldn't put the value at less than $20.00; E. O. Tobey, p. 327, places it at $27.00 per acre, including the equipment.

The equipment was worth $17,500.00 to $18,000.00, a stestified to by W. L. Tobey, p. 107, although it was alleged in the complaint to be worth $14,000.00 to $15,000.00. He explains this discrepancy on the same page and the defendants did not testify particularly as to the equipment. However, taking the minimum alleged at $14,000.00 for the equipment, and the minimum price of land as testified by Wade at $15.00 per acre, and we have a tottal minimum valuation of $79,250.00 and a maximum valuation of $117,450.00 for ranch and equipment as testified by E. O. Tobey, and a maximum of $120,000.00 as testified by the plaintiffs. From the weight of the testimony it would appear that the value was over $100,000.00.

E. C. Kilbourne testified at p. 379 to the following conversation:

A. On the sixth of March, Mr. DeLarm came into the office and asked if I would consider taking the Tobey ranch, which I had examined, and going ahead—in payment for our bill, and going ahead with the plant, and finishing it, complete it. The result of the negotiations, which lasted over two or three days, were briefly as follows: He said the ranch was worth $120.000.00, that that is what they contracted to pay for it. This is the first time that I knew what he had contracted to pay for it; that is, we would finish the plant, he was willing to allow us a big profit. He says, 'I am willing to allow you $20,000.00 or $25,-000.00. You take the ranch for $75,000.00-'—or we discussed the value of it then—the real value. He said it cost $120,000.00 and that is what it is worth. Well, I said, 'I don't consider it any such value.' Well, he reduced it finally to $100,000.00 and proposed that we take the plant and call it $75,000.00, for our services, plant, etc., and he retain one-fourth interest in the ranch."

Again, p. 437: "When I protested about his paying such a price for the farm, it wasn't worth it, and he explained, why, as I said, I asked him—I says, 'Where did you get your bonds? How did you get so many?' "

If the date of this conversation is correct, it was two days after the contract of March 4, 1911, Exhibit A to the Bill, p. 24. The $120,000.00 consideration would indicate that it was after the first contract was

signed. He knew the value that the Tobeys placed on the ranch and he knew the value DeLarm placed on it, and that DeLarm was willing to sacrifice big to get some kind of a deal with him. He then knew that DeLarm was reckless in his dealing in the bonds, and was willing to encumber the Wahluke project with large issues of bonds to accomplish results at less than fifty per cent of the proceeds finally derived from their disposition.

6. E. C. Kilbourne, as just shown, testified that DeLarm proposed that he retain a one-fourth interest in the land. There is some slight evidence in this case that he did so. In Exhibit 148, at page 648, C. A. Kilbourne uses this language: "However, on account of a desireto settle up our partnership matter, we will consider any reasonable proposition madeto us at this time." This letter was written to DeLarm in response to a telephone communication July 7, 1911, and encloses to DeLarm an inventory of the ranch. Then two months later the Kilbournes give Wakefield a mortgage to pay DeLarm $10,000 and the Dredging Co. $7,500. They offer the explanation that this is to release them from the construction of the second unit; but they cannot and did not explain why they were paying DeLarm $10,000 and the Dredging Co. $7,500 when this $7,500 was a debt DeLarm was to pay. Under the difficulties of making collections from DeLarm the reasonable thing to have done would have been to have ap-

plied $7,500 of this $10,000 to the payment of the Dredging Co. No receipt or written release is shown to have been given by DeLarm to the Kilbournes to release them from building the second unit. Neither of the Kilbournes would explain the reason they paid DeLarm the $10,000 instead of giving him $2,500 and the Dredging Co. the $7,500, other than it was to release them from building the second unit. E. C. Kilbourne, p. 412; C. A. Kilbourne, pp. 531 and 533-4.

If DeLarm still held an interest in the ranch after the Tobey deal, this would offer the solution why the Kilbournes were willing to furnish the $7,500 to the Dredging Co. and still pay DeLarm the $10,000.

7. There are some circumstances in this case taken in connection with the whole case that tend to show that the Kilbournes were parties with DeLarm or had knowledge of the fraudulent acts and that shows that the Kilbournes were interested with DeLarm in the transactions.

a. E. C. Kilbourne visited the Tobey ranch with DeLarm, and the circumstances might show either lack of knowledge or a desire to assist DeLarm (E. C. Kilbourne, pp. 371 to 378; W. L. Tobey, pp. 96-98). It will be remembered that DeLarm agreed to pay all expenses, p. 372. Mr. Kilbourne said: "I will go down and take a look at it, if you will pay all the expenses, which he readily agreed to do."

This trip, according to Mr. Kilbourne, was wholly an accommodation affair, and just why he found it

necessary to ask DeLarm to pay all expenses doesn't appear. In fact, unless he knew that profit was to come to him out of the trip, it would have been proper for him to ask DeLarm to pay him for his time.

Again, on p. 339, F. L. Tobey testified:

"There was some talk among the four of us about the stock. Mr. Kilbourne made a remark that we had a very nice bunch of stock, and I think in the course of the conversation he asked, in the event of a trade, if the purchasing party would be allowed to select the stock to a certain number that had been agreed upon. We told him that we would reserve that privilege ourselves."

The fact that Mr. Kilbourne desired to select the stock may or may not be significant according to the point of view. But with all the other facts in this case it looks significant of the fact that the Kilbournes were interested at that time in the deal.

The talks E. C. Kilbourne had with Biehl, pp. 352 and 335, shows that Mr. Kilbourne was interested in the deal before he went down there.

b. The Kilbournes held a lot of the water mortgages as security for their indebtedness and knew what they were. Exhibits 139, 140, 141, pp. 642-3. Testimony E. C. Kilbourne, pp. 421-5, and knew that they were at least part of the securities behind the bonds, p. 393.

c. The contract for the second unit was never put in writing. E. C. Kilbourne, p. 388, except as con-

tained in Exhibit 58, p. 582. Mr. Kilbourne testified as follows, p. 388

Q. You may state when this agreement in which you were to complete these matters, and take the property in payment, the date?

A. The 24th of March, 1911.

Q. And you say it was never put into writing?

A. Only partly. I turned immediately to our stenographer, and dictated that letter to blank, that is in evidence here. The other people put it in.

And again on page 392, he testified:

Q. (Continuing). And the intake. I show you Plaintiffs' Exhibit 58, and ask you if that is the letter you refer to, which is a settlement beetween you and the Orchards Company and DeLarm, to which you have just referred?

A. Yes, that covers part of the settlement.

Q. Which part?

A. The part which we were to do. Complete the plant, and that the Kilbourne & Clark Company had been paid. I will state right here that that is not exactly as I dictated it the first time to our stenographer. I addressed it to the Columbia River Orchards Company, but, at Mr. DeLarm's request, I changed it to the Washington Orchard Irrigation and Fruit Company. That is the first time that I knew that company was in existence."

Now, if they were intending to write a letter for advertising purposes to assist DeLarm in trading

off his bonds, this letter would be fully explained by that fact. In it they say: "We are enclosing the contract on our part to install the second unit at such time as you may required the same." The contract could not have been enclosed if it had not been in writing. The date of this letter, too, is March 27, 1911, three days after he said they came to the agreement, and it is written in Portland and directed to the office in Portland. We think that it would be in line with all the facts in this case to construe the writing of this letter as done to assist DeLarm in the further sale of bonds, and DeLarm dictated the company to whom it was addressed, to give effect to the guarantee in the bond with proposed traders.

D. Inconsistencies in the Kilbourne testimony.

1. On page 443, E. C. Kilbourne was asked the question:

Q. Now, Mr. Kilbourne, in reference to the other matter about the bonds, you say that as far as you knew, the bonds were all right. Now, isn't it a fact that up to the time of the Tobey deal, you knew that the DeLarm outfit and all their institutions were broke, and couldn't raise money?

He turned this question off by the answer:

A. They kept Mr. Fox going $5,000 a month.

Q. Well, you couldn't get your money out of them, could you?

A. Well, the reason was very often because Fox was a better collector and he got it.

The Fox contract was not entered into until Jan. 3, 1911. Exhibit 66, p. 598, and Exhibit 59, at p. 586.

It would take Fox a little while to get started on this contract. He would have to assemble his men, teams and tools, and by the time of the Tobey deal there couldn't have been more than one payment due, yet the witness testified as though the contract had been running for a good while. The fact was he was trying to and did evade the straight answer called for by the quesetion.

In Lewis B. Sichler's testimony we find, p. 283, that Fox had a lien for $32,000, so that Fox couldn't have been much the better collector.

2. On page 389, Mr. Kilbourne testified:

Q. Now, I wish you would tell the reason why the second unit was not installed and completed as per agreement just spoken of.

A. In the fall of 1911, September, Mr. DeLarm came to me and said that he was very anxious to get some money to pay for the right of way and ditch, and the land there, to the Northern Pacific.

Mr. Plummer testified, p. 166:

"Mr. Wright had paid in June, $2,700.00 towards the right of way, which was merely a first payment, because they hadn't yet determined what the acreage was, so we couldn't figure up what the consideration would be. That was June of 1911. That money was held until September of the same year, when they gave us the acreage and paid the balance

of the consideration, $194.00. We then prepared a deed running to the Columbia River Water Company, which was made to that company at the request of Mr. Wright. That deed was sent to St. Paul, for execution and was delivered to Mr. Wright, on November 1, 1911."

This disposes of his reason for the $10,000.00. Aside from that the whole of the right of way and pump house site embraced but 57.88 acres at $50.00 an acre. On page 394, Mr. Kilbourne testified: "One of the first jobs we did was to make a survey of the land and find out where it was situated and furnish that very information to the Columbia River Orchard Company." Again on p. 396:

Q. What was your interest in the right of way for the canal?

A. I was acting as engineer for the Columbia River Orchard Company.

If this statement that DeLarm wanted the $10,000 to pay for the pump house site and the right of way for the canals, was true, then he knew that it would take less than $3,000 to pay for the land, and that DeLarm was giving a fictitious reason.

3. In April, 1911, he knew that a receiver had been appointed, Oscar G. Heaton, p. 228; E. C. Kilbourne, p. 402; but this didn't alarm him a bit. On pp. 402-3, he testified about his conversation in full with Heaton and that he gave Heaton a ten dollar check to collect the Kilbournes account, but he

doesn't explain what account he wanted collected. At this time the only accounts in the record the Kilbournes appear to have been interested in was the payment by DeLarm of the Moran account and the Dredging Co. account, and these two accounts were fully secured. Nor does he show what became of this transaction or whether he investigated it any further.

4. The identification of the copy of the Nott letter, Exhibit 142, p. 644, was sought to be made by E. C. Kilbourne at pp. 422-3. It took repeated efforts to get the witness to even examine the letter, and he evaded the identification in a petulant manner, and finally being asked:

Q. Do you deny the copy there is the copy of the one he wrote?

A. No, I don't deny that the moon was made of green cheese, either.

This Nott letter showed closely that they had been identifying themselves with DeLarm's bond trades, and it was little wonder he was trying to avoid its identification. Its being an unsigned copy sent to Hodges made it difficult of identification. But such a letter was sent and the language used in Mr. Kilbourne's letter of transmission, Exhibit 140, p. 643, is also significant and proves that they had assisted DeLarm in his bond trades. Thepurpose of the letter was to inform Nott that they wouldn't buy his land so that the way would be paved for Hodges to trade bonds for it. Attention has heretofore been

called to the fact that this copy bears internal evidence of its genuineness.

5. The manner in which E. C. Kilbourne sought to evade the statement of the amount they paid for the land, on p. 410, and his reference to Mr. Tobey, shows the character of his testimony whenever cornered for a definite statement.

Q. That is the gross amount that you agreed with Mr. DeLarm on?

A. We didn't do it in figures; we said we would take the ranch and do so and so, and he would do so and so, and we didn't reduce it to figures at all; the consideration wasn't in dollars; he wasn't paying us in dollars; he was paying us in a ranch, and you could call it $140,000 as Mr. Tobey did once, or $100,000 as he did once, or $75,000 or $80,000 as he did once.

6. E. C. Kilbourne, in his testimony on p. 373, had to take a fling at the Tobeys' man: "and they prepared a meal for us of which I ate only about crackers, *the only thing I saw fit to eat there.*"

7. It was shown by J. H. Edwards, pp. 195-6, that E. C. Kilbourne had come in to the bank and talked with him about the affairs of the Columbia River Orchard Co.; but on pp. 398-9, Mr. Kilbourne tried to make it appear as though this had been just a casual conversation. Yet he said to Mr. Edwards in reference to the project in a general way: "that he was glad to know that the Trust Company and the City

was inclined to take hold of good industrial enterprises, things which would help to develop the country," and this conversation was with reference to DeLarm's operations.

This fact, along with the others, shows that Mr. Kilbourne was keeping close tab on the affairs of DeLarm and his corporations.

8. The $43,000 account accrued in July, 1910, and from that time to the 4th of March, 1911, they had received very little pay on the account. During this eight months Dr. Kilbourne would have us believe that they paid but little attention to the affairs of DeLarm's corporation. The Kilbourne Clark Co. was hard up and in fact went out of business December 31, 1910, on account of hard times. We could presume it to be a fact that the Kilbournes were keeping pretty close watch of DeLarm and Biehl and their corporations and be clearly within the evidence in this case, notwithstanding their protestations of ignorance.

9. By the payment of $10,000.00 to DeLarm for the release of the agreement to construct the second unit, they knew, if their testimony on this point is to be taken as true, that they were thereby jeopardizing the final construction of the second unit and were thereby lessening the value of the bonds, if they thought the bonds were good.

10. What did E. C. Kilbourne pay for his interest in the Tobey ranch?

It was conceded by the defendants all through the case that the two Kilbournes owned the ranch as partners. E. C. Kilbourne testified, as heretofore shown, that he and C. A. Kilbourne agreed to assume the $4,000 debt to the Kilbourne & Clark Co., and to finish the plant and to build the second unit. They haven't paid the $43,000. C. A. Kilbourne borrowed the money on the land to finish the construction of the plant and to pay DeLarm the $10,000.00 and it does not appeear that E. C. Kilbourne is bound in any way to pay this except as it might be assumed from its being in the shape of a mortgage on the place. E .C. Kilbourne, however, testified that they put up the Glover ranch to secure the payment of the Puget Sound Bridge & Dredging Co. account. But the things that were traded for that land was $2,950 owed to C. A. Kilbourne and some items of machinery. But it doesn't appear whether this belonged to the Kilbourne & Clark Co. or to the Kilbournes or to which one of them. C. A. Kilbourne testified that E. C. Kilbourne was to have an interest in the land in proportion to what was coming to him from the Kilbourne & Clark Co., p. 496, but what this proportion was they don't presume to say.

The payment for the interest of E. C. Kilbourne in the land stands in this predicament so far as the evidence is concerned:

He has an interest in the land as a partner. There

is a conflict in the evidence between him and C. A. Kilbourne as to payments for that interest.

There is no definite or certain amount shown that E. C. Kilbourne paid for his interest.

E. C. Kilbourne sets up the defense along with C. A. Kilbourne that he is an innocent purchaser for value. The law places the burden on him to make this defense good, and in doing so it imposes on him the duty to make full and complete disclosure of all the circumstances. This he has not done, but has evaded it and we have a right to take advantage of this fact and say to the Court, that these facts in themselves defeat his claim to be an innocent purchaser for value without notice.

11. C. A. Kilbourne testified, p. 497, that every claim against the Kilbourne & Clark Co. had been paid and the Court so found in the memorandum on the merits, p. 73. But the evidence shows that it has not been paid, but only secured by the Glover land, and this was not done until the following July, when the bonds of the Columbia River Orchard Co. were selling for but a few cents on the dollar.

12. The Kilbournes would not accept bonds for their pay.

Biehl testified, p. 358:

"Oh, yes, they couldn't consider bonds. They needed cash for their business. They were not bankable at that time."

E. C. Kilbourne testified concerning bonds, pp. 3923-:

Q. Now, before we leave this branch of the subject, I will ask you whether Mr. DeLarm, in all your negotiations, ever tendered you bonds in payment, or asked you to take them?

A. If he did, it was never considered. I don't remember that he ever did. He may possibly, but—

Q. But you don't remember?

A. No.

Q. Why wouldn't you consider it?

A. Well, it is a fixed policy of our company not to do it, and the company was short of money and couldn't do it; that is the Kilbourne Clark Company. They have to have money to carry on transactions, and Mr. Kilbourne was advancing money all the time to carry on these, and to continue other irrigating.

C. A. Kilbourne testified concerning taking bonds, p 507:

Q. Did you ever have any of these bonds offered to you in payment?

A. Never presumed to offer us bonds at all. He knew that we were not able to carry bonds. couldn't take our pay in that way, and he never offered them.

But when DeLarm traded the bonds for tangible property, they were very willing to take that property. Although they must have cash, according to the story of the Kilbournes, they got no cash out ofthe Te-

bey ranch, and so were in no better situation for cash than they would have been had they taken bonds for what was due them and quit further work.

According to their story, the money received from the mortgages on the land was practically all paid out on the project and on the Glover land.

DeLarm never *presumed* to offer them the bonds. We can only infer from this language that DeLarm, knowing the bonds were worthless, supposed that the Kilbournes also knew this, and C. A. Kilbourne, knowing that DeLarm knew the Kilbournes either knew or suspected that the bonds were worthless, testified as he did, and hence he, DeLarm, never *presumed* to offer what he knew would not be accepted.

The Kilbournes knew the kind of security that was in the hands of the Oregon & Washington Trust Co., and that were behind these bonds, and they knew that those securities could not be sold in case of default in payment of the bonds or on the interest. They knew as securities behind the bonds, they were worthless and that the clause in the bonds, stating that they were backed by good(valid and solvent securities, was a fraud upon the bond buyers. However much they might think these mortgages might be made good in the future, they knew at the time of the Tobey deal not one cent could be realized upon them. See Exhibit 25, p. 565, Trust Agreement. They had an assignment themselves of $152,000 of these desert land mortgages, and knew that these same mort-

gages or a considerable portion of them were in the hands of Hodges, the trust officer, and that Hodges was inquiring about others. Exhibits 140-141, p. 643. While this letter was written in June, 1911, we were unable to learn when these mortgages had been surrendered.

At this point we desire to recall attention to the language quoted from Morrow Shoe Co. vs. N. E. Shoe Co., quoted in paragraph X of the law part of this brief, and especially to call attention to the concluding sentence: "If, on the whole case, strong doubts of the integrity of the transaction exist, the prior rights of Davis' creditors will prevail."

So in this case, taking the circumstances as a whole, we think that not only strong doubts are cast upon the bona fides of the transactions between the Kilbournes and DeLarm; but that the evidence shows that the Kilbournes were parties with DeLarm and knew all about his whole transactions, had knowledge of the fraud and profited by it.

The language in Paragraph X, quoted from Zimmerman vs. Bannon, 77 N. W. 736, is especially applicable here. Shutting out all the documentary evidence and the implicating facts and taking the oral statements of the Kilbournes as gospel truth, the Court would find them to be innocent purchasers for value; but when all the facts and circumstances are taken into consideration and the whole environment taken into consideration, then it becomes apparent

that the Kilbournes' outward form, though from their own testimony apparently honest and virtuous, is really but a mask to hide their participation in the fraud that was not only practiced upon the Tobeys, but upon others as well.

We respectfully submit that the case should be reversed and a decree entered here granting the appellants the relief prayed for in the bill.

Respectfully submitted,

A. C. WOODCOCK,
E. R. BRYSON,
R. S. SMITH,
JOHN M. WILLIAMS,
LOUIS E. BEAN,
Attorneys for Appellants.